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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Amendment of the Commission's	)	PR Docket No. 93-38
Rules to Permit Private Carrier	)	
Paging Licensees to Provide	)	
Service to Individuals	)	

REPLY COMMENTS OF RADIOFONE, INC.

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SUMMARY

Radiofone, Inc. opposes the Commission's proposal to expand the eligibility requirement for private carrier paging operations to include individuals. The effect of this expanded eligibility is to eliminate the eligibility requirement altogether. Implementation of this proposal, along with the companion proposal to award exclusive frequencies to private carrier paging operators (PR Docket No. 93-35) would severely undermine common carrier paging as a viable service, thereby contradicting both the letter and intent of Section 2(b) of the Communications Act of 1934, as amended. The effect of this action would be to improperly preempt State regulation. This would ignore the States' legitimate interest in ensuring that its individual citizens have a reliable and viable common carrier paging service, so as to guard against consumer abuse and substandard service. The States also have a legitimate interest in preventing ruinous competition, and facilitating law enforcement efforts. Thus, the Commission's proposals would be ultra vires and must be abandoned. Only Congress can decide whether it wishes to write the eligibility standard out of the Act, and impede legitimate State interests.

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In the Matter of	)	
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Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals	)	PR Docket No. 93-38

To: The Commission

REPLY COMMENTS OF RADIOFONE, INC.

Radiofone, Inc. (Radiofone), by its attorney and pursuant to Section 1.405(b) of the Commission's Rules, 47 C.F.R. § 1.405(b) (1992), submits its Reply Comments in response to the Comments filed in the above captioned proceeding.

I. STATEMENT OF INTEREST OF RADIOFONE

Radiofone is licensed by the Commission for both common

II. OVERVIEW

Radiofone opposes the proposed elimination of private carrier paging eligibility requirements. Implementation of

III. IMPLEMENTATION OF THE COMPANION PROPOSALS WOULD STRIP AWAY THE ONLY SIGNIFICANT OPERATIONAL DISTINCTIONS BETWEEN COMMON AND PRIVATE CARRIER PAGING, UNDERMINING THE VIABILITY OF COMMON CARRIER PAGING AND THE PURPOSE IT SERVES.

The Commission proposes in the instant proceeding to "enable paging licensees at 929-930 MHz and in the Business Radio Service to provide paging service to individuals . . . ." NPRM at para. 2. Additionally, the Commission proposes, in a companion proceeding, PR Docket No. 93-35, to grant channel exclusivity to private carrier paging licensees (PCPs) operating in the 929-930 MHz band. Notice of Proposed Rule Making, PR Docket No. 93-35 (Amendment of the Commission's Rules to Provide Channel Exclusivity To Qualified Private Paging Systems at 929-930 MHz) (released March 31, 1993). Implementation of these proposals would hinder common carriage in paging by making it operationally indistinguishable from private carrier paging, while still retaining statutorily mandated regulatory disincentives imposed on common carriers.

As a result of a series of Commission decisions over the past 15 years, permissible operations of most common carrier paging licensees and private carrier paging licensees already are very similar. PCP systems operating in the 900 MHz band operate under effective radiated power (ERP) constraints nearly identical to those of common carrier 900 MHz operations, with most stations able to operate at 1000 watts ERP. Compare Rule Section 90.494 with Rule Sections 22.502(c) and 22.505(b). High power VHF PCP operations actually enjoy

an advantage over their common carrier counterparts, since the common carriers are under a 500 watt ERP limit, while there is no limit on the PCP operations. Compare Rule Sections 22.502(a) and 22.505(a) with Rule Section 90.205(b). And limitations on direct interconnection of PCP systems with the public switched telephone network have not proven to be a legitimate distinction, since most common carriers find it more spectrally efficient to utilize the same "store and forward" mechanism to batch their pages, as is used by PCPs. Use of this mechanism has been deemed by the courts to provide the necessary "break" in connection with the public switched telephone network to avoid the interconnection limits on PCPs.

bargain struck between the sovereign and common carriers: The common carrier agrees to abide by consumer protection regulations not imposed upon other businesses in exchange for certain privileges conferred by the sovereign.

The Commission proposes finally to unhinge the bargain, by expanding these privileges to PCPs, but still leaving common carriers subject to the same common carrier requirements. RadioCall Comments correctly note at paragraph 3 that, "adoption of the Commission's proposal would make private carriers the functional equivalent of common carriers -- without accompanying common carrier-type regulations." For example, common carriers still would be subject to state entry and rate regulation, the nondiscrimination and "reasonable rate" requirements of Title II of the Act, as well as state, and possibly federal tariffing requirements. See AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992). While PCP licensees can pick and choose the prime customers, common carriers must serve all comers. "A common carrier must be held to a very high standard of public service which is even greater than that required of a broadcaster." Microwave Communications, Inc., 18 FCC 2d 953, 973 (1969) (Commissioner Lee, dissenting). Common carriers are also subject to annual reporting requirements not imposed on PCPs, and face monetary forfeitures ten times greater than those imposed on PCPs for the same offense. In addition to imposing obvious compliance burdens, these requirements also limit common carriers'

marketing flexibility by discouraging prices and products tailored to individual customer needs.

By unhinging common carrier regulation, the Commission would eliminate common carriage as the viable service anticipated by the Act. To be certain, carriers licensed under Part 22 of the Commission's Rules still would be known as "common carriers" and still would be subject to the above restrictions. However, the Commission has equated private radio eligibility with the private radio service involved, "because historically and practically, the two concepts have been synonymous, i.e., special emergency users are eligible to use the special emergency service, and so forth."[2] Therefore, according to the Commission, private radio eligibility defines the service. Where the limiting principle of eligibility has been "expanded" to include all comers, then the private radio service spills out and swallows up common carriage. By unhinging the common carrier bargain to grant identical privileges to PCPs, and by abolishing the limiting principle of eligibility, the Commission undermines the ability of common carriers to carry out the role assigned to them by Congress, and unlawfully inhibits the ability of each state to safeguard its citizens with regard to those matters left to state jurisdiction under the Act.

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[2] Report and Order, 3 FCC Rcd 1838, 1840 (1988) (Amendment of Part 90, Subparts M and S, of the Commission's

The relevant legal issue is not what effect the Commission's proposal will have on PCPs. Instead, the Commission should consider the effect on radio common carriage wrought by these proposed changes. Paging companies will no longer have an incentive to maintain their common carrier status, creating artificial pressure in the marketplace that could strand substantial investment by common carriers. As demonstrated below, disintegration of common carriage in paging violates the letter and intent of the Act, and unlawfully preempts state regulation.

IV. DISINTEGRATION OF COMMON CARRIAGE IS CONTRARY TO THE ACT, SINCE KEY PROVISIONS WOULD BECOME INOPERATIVE

The Commission argues that Congress gave it "broad authority to expand eligibility in the private radio services to the largest feasible number of users."[3] Likewise, Comments filed supporting the proposed "relaxation" of eligibility claim that new Section 332 of the Act, 47 U.S.C. § 332,[4] gives the Commission power to "remove" private radio eligibility restrictions.[5] Although none of the comments provides legal analysis, supporters suggest Congress gave the Commission

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[3] Notice of Proposed Rule Making, PR Docket No. 93-38, at para. 5 (released March 12, 1993).

[4] Section 332 of the Act was originally enacted as Section 331, but codified as 47 U.S.C. § 332. See Public Law No. 97-259, 96 Stat. 1087. It has been redesignated as Section 332 of the Act.

[5] Page 7 of comments of PageMart, Inc. filed on July 23, 1992 supporting NABER's Petition for Rule Making (hereinafter, Preliminary Comments of PageMart).

carte blanche power to add, modify or delete private radio service eligibility restrictions.

The proposed "expansion" of eligibility would in reality

However, on many occasions the Courts have overturned extreme interpretations effectively eliminating portions of a statute. "The cardinal principal of statutory construction is to save and not to destroy." National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). It is a "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." United States v. Nordic Village, 112 S.CT. 1011, 1015 (1992). Congress unquestionably intended that the phrase "eligible users" operate as a limiting principle, establishing a boundary between private and common carriage. By attempting to remove that boundary through evisceration of eligibility requirements, the proposals would further disintegrate the difference between common carriage and private carriage, and remove eligibility's "operative effect." See id. Likewise, by undermining the concept of common carriage, the proposed actions would make largely inoperative Title II common carrier regulations. See 47 U.S.C. § 200, et. seq.

Supporting Comments claim that Section 332 of the Act requires the Commission to, among other things, provide private mobile radio service "to the largest feasible number of users." 47 U.S.C. § 332(a)(3).[7] However, this spectrum management goal cannot be construed to negate Congressional intent that eligibility and other mechanisms separate common and private carriage. "A statute should be read so as not to

[7] Preliminary Comments of PageMart, Inc., at page 7.

create a conflict." Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355, 370 (1986). The private radio services were created to further eligible business and industrial uses. Section 332 of the Act must be construed to encourage widespread private mobile radio service consistent with eligibility standards. Thus, Congress directed the Commission to facilitate provision of private mobile radio services to the largest feasible number of eligible users within the

land mobile services," it had in mind the concept then in existence, not some other service of a new character that would obliterate other key elements in the Act's regulatory scheme.

Indeed, a key purpose behind passage of the Communications Amendments Act of 1982 was to establish "a clear demarcation between private and common carrier land mobile services . . . ."[10] Congressional demarcation between private and common carriage can only be construed as reaffirmation of and continued support for common carriage as a viable and distinguishable land mobile radio service. However, the proposals in these proceedings would uncouple a statutory mechanism establishing this demarcation. Section 332(c)(1) "authorizes the entrepreneurs involved . . . to offer their services or facilities to eligible users indiscriminately . . . ."[11] Thus, part of the statutory formula for delineating private from common carriage involves a distinct definition of "private" radio, i.e., indiscriminate offerings to eligible users. Proposals to eliminate eligibility would destroy the statutorily crafted demarcation by making the definition of private carriage the same as that for common carriage: indiscriminate offerings to all users. Elimination of the demarcation renders meaningless the concept

[10] 1982 U.S. Code Cong. & Ad. News 2237, 2298 (Conference Report at page 54).

[11] Id. at 2298 (Conference Report at page 55) (emphasis added).

of common carriage in these radio services. And as discussed below, there are valid bases for this demarcation which are ignored by the Commission's proposal. As noted above, the legal issue in these proceedings is not so much the status of private paging carriers, but the effect on common carriage.

The proposed elimination of private radio eligibility would be ultra vires, since it contradicts standard statutory construction of the Act and Congressional intent evidenced in the legislative history. It also ignores the potential depletion of spectrum which Congress intended to be set aside for commercial and industrial uses. This proposal must be abandoned.

V. THE PROPOSAL UNLAWFULLY PREEMPTS STATE REGULATION BY ELIMINATING STATE CONTROL OVER SERVICE INTENDED TO BE COMMON CARRIAGE

If implemented, the proposal to eliminate eligibility requirements would effect a de facto preemption of state regulation. States retain statutorily mandated authority to regulate common carrier stations. 47 U.S.C. §§ 2(b), 221(b). By breaking down the Congressionally crafted demarcation between private and common carriage in land mobile services, proposals in these proceedings would remove from state regulation radio service Congress intended to be regulated by the states. What presently, and properly under the Act, is land mobile common carriage would be impermissibly redefined as private, and removed from state oversight.

"The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." Louisiana Public service Comm'n v. F.C.C., 476 U.S. 355, 369 (1986). Congress did not intend that FCC regulation supersede state regulation of the land mobile radio service demarcated as common carriage. First, as noted above, Congress reaffirmed its support for land mobile common carriage by establishing in the Communications Amendments Act a demarcation with private carriage. Second, Congress long has intended that states regulate common carrier stations. See 47 U.S.C. §§ 2(b), 221(b). Third, Congress explicitly reaffirmed its intention that states regulate "carrier station in the mobile service." 47 U.S.C.

i.e., use licensing powers to circumvent jurisdictional limitations.

While Comments of PageMart, Inc. and Paging Network, Inc. proclaim that there is no public benefit for retaining the current rule, this ignores the states' legitimate interest in regulating services provided to its individual citizens. As the Commission recognizes, the group that PCPs will now be able to serve are "consumers." NPRM at para. 14.

It is well established that individual consumers need protections that more sophisticated commercial and professional users do not. Traditionally, Part 90 eligibles primarily have been businesses, professionals, or individuals subscribing for business use. These eligibles generally are presumed to have the sophistication and resources to "take care of themselves" in dealing with unregulated entities, or to decide that they should restrict their dealings to regulated ones. Experience has shown, however, that individual consumers lack this ability to deal on equal footing with certain types of unregulated entities, and are often the victims of scams, or substandard products and services.[12] [13] By regulating common carriers with regard to

[12] There have been several recent instances of the need for state and federal intervention in the telecommunications realm for consumer protection purposes, including efforts to stem abuses in the alternative operator services field (Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (1990) [codified at 47 U.S.C. § 226]), as well as the re-regulation of cable television rates (Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385).

their charges, classifications, practices, services, facilities and regulations pursuant to Section 2(b) of the Act, states can be assured that individuals will receive service from an entity that has been adjudged by the state to be reputable, and in any event remains under the state's control if abuses occur.[14] The states also have a legitimate interest in protecting their citizens by preventing ruinous competition (leading to substandard services) in the provision of paging to individuals.

Comments supporting the Commission's proposal to eliminate eligibility requirements make much of a projected upswing in the market for personal paging use. Dramatic expansion of personal use of paging would trigger important

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[13] Indeed, one of the justifications which the Commission cites for the proposed rule change is that PCP systems "rely increasingly on mass market distributors to resell their services to paging customers. . .making it difficult for licensees to verify or control who ultimately uses those units and for what purpose." NPRM at para. 10. This only underscores the potential for scams and other abuses in connection with service to individual consumers. In essence, the PCP industry is not in a position to exercise control over what representations are made to the public about the service they will receive. The states maintain the ability to exercise control over this aspect of common carrier operations, either by requiring a tariff or by placing conditions on the issuance of a certificate of convenience and necessity requiring protections for potential customers of the service.

[14] While many states have forborne from regulating many aspects of common carrier paging, because of increased competition among common carriers providing this service, this does not mean that common carrier entities are unregulated in those states. The states are free to reimpose more strict regulations at any time, as many states are doing in connection with trying to curb the use of pagers in drug-

federal and state interests in consumer protection, law enforcement and other interests which are best advanced by common carrier regulation. Moreover, Comments supporting these proposals are couched in competitiveness terms, extolling the virtues of wider competition. However, it should be noted that while competition can be effective in reducing price, and bringing products to market, it is not effective in curbing consumer fraud, law enforcement problems or other abuses traditionally the subject of common carrier regulation.

If the future growth in paging really is with individuals, as projected, then the public interest would best be served by revising the rules as necessary to better facilitate individual use of common carrier paging services.

CONCLUSION

WHEREFORE, it is respectfully requested that the Commission abandon the proposals to eliminate eligibility requirements in private carrier paging.

Respectfully Submitted,

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